

Appeal from separate determinations of the Idaho State Office, Bureau of Land Management, rejecting a patent application for two mining claims and declaring the claims abandoned and void. IMC 42697, IMC 121619, and IDI-29497.

Set aside and remanded.

1. Administrative Procedure: Decisions--Rules of Practice: Appeals: Generally

Where, subsequent to the filing of a notice of appeal, BLM discovers that a factual predicate of its decision was in error but, nevertheless, concludes that its decision might be justified on alternative grounds, the proper course of action is to file a request with the Board to set aside the original determination and return jurisdiction over the matter to BLM so that it might adjudicate the matter further.

2. Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Regulations: Applicability--Rules of Practice: Appeals: Generally

Where it benefits the affected party to do so, and where there are no intervening rights which will be adversely affected, a mining claim recordation regulation which is amended while the matter is pending may be applied in its amended form.

APPEARANCES: Robert D. Thompson, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert D. Thompson and L. Susan Thompson have appealed from a determination of the Idaho State Office, Bureau of Land Management (BLM or the Bureau), dated April 8, 1993, declaring the Consolation No. 1 (IMC 42697) and the Opal Mountain No. 1 (IMC 121619) lode mining claims abandoned and void, as well as a subsequent determination of the Idaho State Office, dated April 23, 1993, rejecting a mineral patent application

embracing these two claims (IDI-29497) on the ground that the claims involved were abandoned and void. For reasons set forth below, we set aside both determinations.

The Consolation No. 1 lode mining claim was originally located on October 7, 1966, by William E. Swan. <sup>1/</sup> Thereafter, through a series of mesne conveyances, interspersed with amended locations, title to this mining claim apparently vested in five individuals: the Thompsons, Calvin J. and Leona A. Lichtenwalter, and Caleen Goodwin. The claim was recorded under section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1994), on October 22, 1979, and annual proofs of labor were filed in each successive year through 1991.

The Opal Mountain No. 1 lode mining claim was originally located on May 18, 1987, by the Lichtenwalters. This claim, which is in the shape of a triangle, abuts the Consolation No. 1 on the east. Title to this claim ultimately vested in the same five individuals who held interests in the Consolation No. 1. Annual proofs of labor for this claim were also filed through 1991.

On October 24, 1991, Calvin Lichtenwalter submitted an application for a mineral survey of the two mining claims, thereby initiating the patenting process. This application was accompanied by a remittance in the amount of \$1,050 as "[a] deposit \* \* \* to cover the estimated cost of office work." See Item 6, Form 3860-5, "Application for Survey of Mining Claim." An Order authorizing the mineral survey (Mineral Survey No. 3683) issued on March 26, 1992. The claims were surveyed between May 4 and May 22, 1992, and the Plat of Survey was approved on August 11, 1992. On September 15, 1992, a formal application for patent of the two claims was submitted to BLM under serial number IDI-29497. Among the many documents submitted at that time were proofs of labor covering each of the two claims for the assessment year ending at noon of September 1, 1992. All of the documents received on September 15, 1992, including the proofs of labor, were filed in the patent application file. No notation was made of the receipt of these affidavits of labor in the recordation files for the two claims.

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<sup>1/</sup> The Consolation No. 1 was one of a series of claims located by Swan, which includes the Consolation Nos. 2 and 3. While these three claims were given different serial numbers, all three of them were included in a single case file at the time of the original recordation of the claims since they were filed for recordation by a single individual, Robert G. Boatman. Subsequent thereto, however, ownership of the claims was dispersed among a number of different individuals. The Consolation Nos. 2 and 3 are now apparently owned by Curtis Peder Jeppesen, Jr. While these two claims are included in the present case file, they are in no way involved in the instant appeal.

Processing of the patent application continued through the remainder of 1992. In a document dated December 17, 1992, BLM acknowledged receipt of various submissions and monies on September 1, 4, 15, and 22, 1992, and informed the patent applicants of additional requirements which needed to be met in order to permit the continued processing of their application. On February 5, 1993, the applicants submitted various documents requested by the State Office, and on February 16, 1993, inquiry was made whether, notwithstanding certain problems relating to evidence of chain of title, it would be possible to proceed with publication of a notice of the applicants' intent to proceed to patent.

Instead of obtaining a response to this inquiry, the applicants received the April 8, 1993, determination that the two claims which were the subject of the patent application were deemed abandoned and void because the annual proofs of labor required by section 314(a) of FLPMA had not been filed on or before December 30, 1992. As noted above, the applicants were further notified in a determination issued on April 23, 1993, that, in view of the fact that the subject claims had been declared abandoned and void, the mineral patent application was rejected and that action would be taken to cancel Mineral Survey 3683. Appeals were then taken challenging both the April 8 and the April 23 determinations.

In his Notices of Appeal, Robert Thompson, on behalf of himself and the other claimants, pointed out that, contrary to the assertion by BLM that it had never received the 1992 proofs of labor, the required annual filing had been included as part of the September 15, 1992, submission. In transmitting the case files to the Board, the State Office addressed this contention:

The documents received in this office on 9/15/92 were filed to support patent application IDI-29497. The documents which included the reference[d] affidavits were placed in the patent file. Because the required filing fees were not filed with the affidavits, the mining claim recordation files were not updated. The affidavits were not returned to the applicant, nor was he informed they would not qualify for the recordation files without the required filing fees.

On 5/5/93, the accounts technician checked our records and determined filing fees were not received for these claims.

(Memorandum of May 6, 1993.)

It is obvious from the above that the State Office has essentially abandoned its original position that the proofs of labor were not received and is now arguing, instead, that, because the required filing fees did not accompany the documents, the filings were invalid.

On November 28, 1994, while the instant matter was pending before the Board, we received a copy of a letter from the State Office, dated

November 22, 1994, sent to an attorney who had inquired with respect to the disposition of various monies tendered with respect to the two claims involved herein. This letter recounted that, in addition to the \$1,050 submitted with the application for survey another fee of \$300 had been tendered with the application for patent. The Bureau asserted that these funds could not be applied to cover the filing fees as they were committed to a specified use.

In a supplemental statement of reasons in support of this appeal filed on August 22, 1996, Thompson took note of the fact that BLM now admitted that the proofs of labor had been timely received and he addressed the issue of whether or not the applicants had tendered the proper fees. Thompson advised that "Mr. Lichtenwalter had understood from his conversations with Boise office personnel that sufficient funds were available, from the account previously established for the Lichtenwalters, Thompsons and Goodwins in the Boise office, to more than cover the small amount of filing fees totalling \$10." Thompson pointed out that BLM now admitted that there was enough money (\$27.21) in the referenced account but asserted that it could not use that money to cover the \$10 in filing fees due for the affidavits because they had been submitted for a different "project," viz. the processing of the patent application for these two claims.

Thompson pointed out that the \$27.21 in their account when the affidavits were filed was subsequently combined with moneys from other accounts and used to acquire computer software for tracking mineral surveys and questioned how this expenditure was more closely related to the patenting process than was the proper filing of the annual affidavit of assessment work.

[1] At the outset, we must express a certain concern with the course of action followed below with respect to the April 8 and 23, 1993, adjudications. We understand how, given the practicalities of BLM's responsibilities, the annual filings were not originally noticed since they accompanied other submissions related to the patent application. Our concern relates to the actions taken after the Notices of Appeal were filed and BLM was alerted to the fact that the annual filings were located in the mineral patent file. It seems to us that the correct course of action at that time would have been to petition the Board to set aside the original decision and remand the matter to the State Office so that it could reconsider the basis of its original determination.

It is obvious from our recitation of the facts that the State Office would have restated its ultimate conclusion that the claims were abandoned and void, but it would have done so on the basis that the filings, while timely received, were not accompanied by the required filing charges and were, therefore, ineffective. Any appeal subsequently taken would have focussed solely on the question of the filing fee since there would have been no need for any party to prove that the affidavits were, in fact, received. Nor would the danger exist that an appellant, being apprised that BLM conceded the main point in its original appeal, would not apprehend that it was now necessary for him or her to address the new issue raised by BLM.

In the future, we would hope that, when BLM discovers, after a notice of appeal has been filed, that the original basis of its decision cannot be sustained, it would request the Board to set aside that decision and return jurisdiction over the matter to the State Office, even in those situations in which the State Office believes that sufficient, independent grounds exist to reiterate the conclusions reached in its original decision. Be that as it may, however, insofar as the instant case is concerned, the question of whether or not the annual filing was accompanied by the required fee has been fairly joined, and we will proceed to a consideration of that question.

[2] Under the operative regulations in effect when the annual filings herein were delivered to BLM, 43 C.F.R. § 3833.1-4(b) (1992), an annual filing which was not accompanied by the proper service charges "shall not be accepted and will be returned to the claimant/owner without further action." 2/ Assuming, arguendo, that the fees which the claimants had submitted for the processing of the patent application could not be appropriated to cover the service charges, BLM should have returned the annual filings for calendar year 1992 when they were received. The Bureau did not do so, since it did not recognize that the submissions had, in fact, been made. As a result, the annual filings were still of record (meaning, in this instance, in BLM's hands) when the April 8, 1993, determination issued and remain in the case file.

The importance of this lies in the fact that, only a few months after the decision herein was rendered, the regulations covering Subpart 3833 underwent a substantial revision. See generally, 58 Fed. Reg. 38186-202 (July 15, 1993). Among the changes promulgated was one addressing the problem of submissions made with inadequate or without any of the requisite fees. Of importance herein, under 43 C.F.R. § 3833.1-3(b)(2) (1993), annual proof of labor submissions unaccompanied by the proper service charges would be accepted "provided the claimant submits the proper service charge within 30 days of receipt of a deficiency notice from the authorized officer." While these regulations were again revised the next year, the substance of this provision has continued to date. The applicable regulation, 43 C.F.R. § 3833.1-3(c)(1), repeats the 1993 rule with respect to service charges associated with the filing of annual proofs of labor and grants a claimant 30 days after receipt of a notice of deficiency in which to make up any deficiency.

These regulations were not, of course, in effect, either when the annual filing was initially made or when the matter was adjudicated by BLM.

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2/ This regulation applied only to filings submitted on or after Jan. 1, 1991. Filings submitted prior to that time were recorded as filed when received by BLM, and the claimant was sent a deficiency notice providing 30 days from receipt in which to submit the requisite fees. See 43 C.F.R. § 3833.1-4(a) (1992).

Nevertheless, the Board has frequently noted that amended regulations may be applied retroactively "when to do so would benefit an affected party and not prejudice the rights of third parties or the interests of the United States." Kathleen K. Rawlings, 137 IBLA 368, 372 (1997); see also Conoco, Inc., 115 IBLA 105, 106 (1990); James E. Strong, 45 IBLA 386, 388 (1980).

We can perceive no bar to the application of this principle to the instant appeal, particularly since the affidavits of labor had not only been timely submitted but were still in the patent file at the time that the regulations were amended. Unlike the situation in United States v. Ballas, 87 IBLA 88 (1985), there appears to be no third party rights which might obviate against acceptance of a late tender of the service charge. Accordingly, we will set aside BLM's decision and remand the case files to BLM with instructions that a notice of deficiency be sent to the claimants and that they be afforded a period of 30 days in which to submit the service charges for the 1992 annual filing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are set aside, and the case files are remanded for further actions consistent with the foregoing.

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James L. Burski  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge